STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEKOVAS JOHNSON,

Defendant-Appellant.

UNPUBLISHED
February 18, 2003

No. 237011
Wayne Circuit Court
LC No. 97-3614-02

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of assault with intent to rob while armed, MCL 750.89, possession of a firearm during the commission of a felony, MCL 750.227b, and discharge of a firearm causing injury, MCL 750.235. The trial court sentenced him to four to fifteen years' imprisonment for the assault conviction, to be served concurrently with a one-year prison term for the discharge of a firearm conviction and consecutively to a two-year prison term for the felony-firearm conviction. We affirm.

Defendant's convictions arose out of the shooting and attempted carjacking of Shon Jones in Detroit in April 1997. Jones testified at trial as follows: He was washing his vehicle at a carwash when a man with a gun walked up to him and said, "this is a jacking." Jones laughed because he recognized the man from high school and therefore thought the man was making a joke. The man then told his companion, defendant, to "show him the shotgun because he thinks this is a joke." Jones then saw defendant standing in the carwash stall with a shotgun. After Jones saw the first man try to open the door to Jones' vehicle, Jones jumped into the passenger seat and locked the doors, at which point defendant shot into the vehicle and hit Jones with buckshot.

Defendant testified as follows: On the day in question, he had finished vacuuming his vehicle and was changing his clothes in a stall at the carwash when his friend with whom he was traveling, Robert Brock, came running up and told him to run. When defendant looked around he saw Jones coming toward him with a gun. Defendant then grabbed his shotgun from his vehicle. Jones shot at him, so defendant racked his shotgun, which "went off and . . . hit the car . . . ." Defendant drove away and Jones followed him and rammed his vehicle. When eventually questioned by the police, defendant stated, "Robert had told me he had beef, he had beef. . . . all I know is that a guy came to my stall and tried to shoot me."

Defendant wrote a statement in which he admitted that he and Brock discussed robbing someone at the carwash. Defendant also wrote in this statement that he shot Jones because he thought Jones was reaching for a gun. Defendant contended at trial that the police coerced him into making the written statement and that it did not represent the truth. Defendant contended that his shooting of Jones had been accidental.[1]

Defendant presented four witnesses, including a youth pastor, who testified that defendant had a reputation for truthfulness.

On appeal, defendant takes issue with several of the jury instructions given by the trial court. However, defendant did not object below to the instructions he now challenges on appeal. Accordingly, our review is limited to a plain error analysis. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must demonstrate a clear or obvious error that likely affected the outcome of the case. *Carines, supra* at 763.

Moreover, this Court reviews jury instructions as a whole. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Even if imperfect, instructions do not require reversal if "they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

Defendant first argues that the trial court erred by failing to give, in conjunction with the aiding and abetting jury instructions, the "mere presence" instruction, CJI2d 8.5, which states, "Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that he was present when it was committed is not enough to prove that he assisted in committing it." However, the evidence showed that defendant's involvement in the events on the day in question went beyond "mere presence." Indeed, defendant *admitted* that he shot Jones, and it was up to the jury to determine whether this shooting occurred accidentally or in self-defense, as argued by defendant. In light of defendant's theory of the case, the court's failure to give CJI2d 8.5 did not impede his defense. See, generally, *People v Moldenhauer,* 210 Mich App 158, 160-161; 533 NW2d 9 (1995). Moreover, this Court has held that no error requiring reversal occurs if the trial court fails to give the "mere presence" jury instruction in the absence of a request for the instruction. See *People v White,* 32 Mich App 296, 298; 188 NW2d 236 (1971). We thus discern no clear or obvious error with regard to this issue. Moreover, given the additional instructions given by the trial court with regard to aiding and abetting (e.g., "[i]t is necessary that the prosecutor prove beyond a reasonable doubt that the defendant intended to help someone else commit the charged offense of armed robbery" and "[t]he prosecution must prove . . . that before or during the crime the defendant did something to assist"), we cannot conclude that the absence of the "mere presence" instruction affected the outcome of the case. Accordingly, reversal is unwarranted. *Carines, supra* at 763.

Next, defendant argues that the trial court erred by stating, with regard to a prior witness statement introduced at trial, that "[i]t may be considered as proof from the facts of the statement." Defendant contends that the trial court should have used the exact wording from CJI2d 4.5, which is "it may be considered as proof of the facts in the statement." We cannot

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[1] However, the jury was also given an instruction on self-defense.

conclude that the trial court's slight misstatement constituted a clear or obvious error or that it affected the outcome of the case. *Carines, supra* at 763. Indeed, the instruction as given fairly presented the issue in question and "sufficiently protected the defendant's rights," *Davis, supra* at 515, and reversal is thus unwarranted.

Next, defendant argues that the trial court erred by stating, with regard to character evidence, that "[e]vidence identified with character alone may sometimes create a reason in your mind and lead you to find the defendant guilty." The correct instruction from CJI2d 5.8a(1) states, "Evidence of good character alone may sometimes create a reasonable doubt in your minds and lead you to find the defendant not guilty." Given the court's use of the words "reason" and "guilty" instead of the phrases "reasonable doubt" and "not guilty," we agree with defendant that the trial court committed a clear or obvious error in his reading of this instruction. We simply cannot conclude, however, that the error affected the outcome of the case. First, immediately before the instruction at issue, the court stated, "You have heard evidence about the defendant's character or honesty. You may consider this evidence together with all the other evidence in the case in deciding whether the defendant committed the crime for which he is charged." These instructions informed the jury that they should consider the testimony of defendant's character witnesses. Second, given the substantial evidence supporting defendant's convictions in this case – including a written statement by defendant that largely corroborated the victim's testimony about the incident – we do not believe that a completely accurate reading of the instruction in question would have affected the verdict. Accordingly, reversal is yet again unwarranted. *Carines, supra* at 763.

Next, defendant argues that the trial court erred by misstating the instructions for the crime of assault with intent to rob while armed. The court stated that the prosecutor must prove

> that at the time of the assault, the defendant intended to commit robbery occurs [sic] when a person assaults someone else or take[s] money or property from them intending to take it from the person permanently.

The correct instruction from CJI2d 18.4(3) states that "[r]obbery occurs when a person assaults someone else *and* takes money or property" from him (emphasis added). Once again, the trial court's misreading of the instruction constituted a clear or obvious error. However, we again cannot conclude that the error affected the outcome of the case because the object and title of the offense itself – robbery – makes clear that more than a mere assault is needed for an offense to constitute robbery. The trial court specifically stated that "the prosecution must prove that the defendant intended to commit robbery," and we conclude that the instructions as a whole fairly presented the issues and adequately protected defendant's rights. *Davis, supra* at 515. The misreading of the instruction did not affect the outcome of the trial, and reversal is not warranted. *Carines, supra* at 763.

Defendant contends that his trial attorney rendered ineffective assistance of counsel by failing to address at trial the purported errors discussed above. We disagree. To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error or errors, it is reasonably probable that the outcome of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.

Id. at 302. Given our conclusions above that the purported errors did not affect the verdict, defendant has not met his burden for establishing ineffective assistance of counsel.

Affirmed.

/s/ Jane E. Markey
/s/ Michael R. Smolenski
/s/ Patrick M. Meter